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No. .....

In The
Supreme Court of the United States
October Term, 1983

SAMUEL P. GARRISON, etc.,
Petitioners,

vs.

GEORGE SMITH ALSTON,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA

RALEIGH DIVISION

No. 81-0049-HC

GEORGE SMITH ALSTON,

Petitioner

vs.

SAMUEL P. GARRISON, et al.,

Respondents

ORDER

(Filed February 4, 1982)

LARKINS, SENIOR DISTRICT JUDGE:

SUMMARY

THIS MATTER comes before this Court on petitioner's Motion for Relief from Judgment filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Although respondents have failed to respond, this motion is ready for ruling.

After careful independent review of petitioner's motion with accompanying exhibits, and memorandum in support of his application for a writ of habeas corpus and respondents' answer and motion to dismiss, IT IS THE OPINION OF THIS COURT THAT PETITIONER'S MOTION BE GRANTED IN PART AND DENIED IN PART AND THAT THE OCTOBER 28, 1981 ORDER OF THIS COURT BE VACATED IN PART AND RETAINED IN PART; THAT HAVING CONSIDERED

THE MERITS OF PETITIONER'S CLAIMS, THE RESPONDENTS' MOTION TO DISMISS BE GRANTED AND PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS BE DENIED AND HIS CASE DISMISSED.

FINDINGS OF FACT

Petitioner was convicted of assault with intent to kill inflicting serious injury, armed robbery and kidnapping on August 19, 1977. He was then sentenced to concurrent terms of life imprisonment for armed robbery and kidnapping and to a consecutive term of twenty years for assault with intent to kill inflicting serious injury.

On appeal, the North Carolina Supreme Court found no error. Subsequently, on March 14, 1979, petitioner filed a Motion for Appropriate Relief setting forth the allegations presented in this case, which was denied by the trial court on March 16, 1979. The North Carolina Court of Appeals denied certiorari and the North Carolina Supreme Court affirmed that denial on July 18, 1979.

Petitioner then sought habeas corpus relief in this Court. On October 28, 1981, this Court dismissed petitioner's claims on the ground that they had not been presented previously in the state courts of North Carolina and were procedurally barred from this Court. Because briefs for petitioner and respondents have been filed with regards to petitioner's application for a writ of habeas corpus, this Court will now entertain petitioner's Rule 60(b) motion and application for federal habeas relief.

CONCLUSIONS OF LAW

Petitioner correctly asserts that this Court incorrectly held that his claims (1), (2) and (3) in his application for a writ of habeas corpus were not asserted in his Motion for a writ of habeas corpus were not asserted in his Motion for Appropriate Relief filed March 14, 1979. The record reveals that those claims were in fact asserted in such a Motion. The record as of the October 28, 1981 Order, however, did not include petitioner's Motion for Appropriate Relief.

Petitioner also asserts that this Court erred in holding that he did not sufficiently demonstrate "cause" and "prejudice" to overcome the procedural default rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977). Upon reconsideration, this Court holds that the petitioner did not show sufficient cause and prejudice to justify federal habeas relief.

A. *Jurisdiction.*

It is clear this Court retains jurisdiction to rule upon this motion. Although a final judgment has been entered and an appeal perfected by the filing of a notice of appeal, this Court retains jurisdiction to consider and deny a motion for relief from judgment. *Schattman v. Texas Employment Commission*, 330 F.Supp. 328 (W.D. Tex.), *rev'd on other grounds*, 459 F.2d 32, *cert. denied*, 409 U.S. 1107 (1971). This specific motion based on the ground of mistake can be made even though an appeal is pending. *Transit Cas. Co. v. Security Trust Co.*, 441 F.2d 788 (5th Cir.), *cert. denied*, 404 U.S. 883 (1971).

Although petitioner has given timely notice of appeal prior to the ruling of this Motion, this Court retains juris-

diction to entertain and rule upon such motion in a habeas corpus action. *Gray v. Estelle,* 574 F.2d 209 (5th Cir. 1978).

B. *Procedural default.*

This Court was incorrect in stating in its October 28, 1981 Order that petitioner did not assert his habeas claims in a Motion for Appropriate Relief. However, the Court is not convinced that federal habeas relief is warranted.

Claims (1) and (2) dealt with evidentiary matters which should have been objected to at trial and were not. Since they were not objected to at trial, they could not be asserted on appeal, N.C.R.A.P. 10(a),(b)(1), or in a Motion for Appropriate Relief. *State v. White,* 274 N.C. 220, 162 S.E.2d 473 (1968). These claims could have been entertained on the merits if cause and prejudice was shown as to why the errors were not objected to at trial or asserted on appeal. *Cole v. Stevenson,* 620 F.2d 1055 (4th Cir. 1980). Upon reconsideration, this Court affirms its earlier Order that petitioner failed to prove cause and prejudice, and, therefore, claims (1) and (2) are procedurally barred from review by this Court. *Wainwright v. Sykes, supra.*

If petitioner disagrees as to the Court's ruling on the cause and prejudice issue he should address such issue in his appeal of the original judgment. This rule providing for relief from a judgment on the ground of mistake is not available as a substitute for appeal. *Horace v. St. Louis Southwestern R. Co.,* 489 F.2d 632 (8th Cir. 1974). Petitioner's motion requesting relief from judgment on the cause and prejudice issue concerning claims (1) and (2) is denied. Since claims (1) and (2) were listed in

petitioner's Motion for Appropriate Relief, his motion to correct that portion of the October 28, 1981 Order is granted.

In that same Order, this Court also stated that petitioner's third claim—ineffective assistance om counsel—was not asserted in his Motion for Appropriate Relief. The record reveals, however, that this issue was listed in such a Motion. Therefore, petitioner's Motion for Relief from Judgment is granted as to that incorrect statement.

Petitioner claims that since this issue was raised in a Motion for Appropriate Relief, it is not procedurally barred from review by this Court. This Court agrees. For this reason, such issue will now be addressed on the merits.

A finding of ineffective assistance of counsel sufficiently demonstrates "cause" and "prejudice" and will allow the court to address issues affected by this claim on their merits. *See e.g., Jiminez v. Estelle,* 557 F.2d 506 (5th Cir. 1977). Such a finding in this case would allow all claims to be addressed on the merits. This Court, however, now holds that petitioner was not denied effective assistance of counsel sufficient to warrant federal habeas relief.

Petitioner alleges that he was denied effective assistance of counsel because: (1) his attorney failed to object to the admission of testimony that petitioner remained silent after his arrest and failed to assert this error on appeal; (2) his attorney failed to object to the admission of Sergeant Burns' testimony that petitioner's attorney made a favorable comment concerning a line-up and failed to assert such error on appeal; and (3) his attorney failed

to object to or raise on appeal evidence tending to show that he had a prior criminal record.

1. *Post arrest silence.*

The test as to whether petitioner has received effective assistance of counsel is whether counsel's performance "was within the range of competence demanded of attorneys in criminal cases." *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977). If the court finds that counsel has failed to perform within this range of competence, an additional showing of prejudice must be made to entitle petitioner to relief. *McQueen v. Swenson*, 560 F.2d 959 (8th Cir. 1977). It must be actual prejudice; not merely possible prejudice. *LiPuma v. Commissioner, Dept. of Corrections, State of N.Y.*, 560 F.2d 84 (2nd Cir.), *cert. denied*, 434 U.S. 861 (1977). In the instant case, it would require that counsel's ineffective representation resulted in potentially meritorious objections not being made and that if such objections had been made and granted there was a reasonable possibility petitioner would not have been convicted. In other words, with reasonably competent counsel it was more likely than not that a jury would have reached a different result, that is, acquittal.

Petitioner's claim (1) is similar to a claim asserted in *Boyer v. Patton*, 579 F.2d 284 (3rd Cir. 1978). In *Boyer*, the court held that where the government elicited testimony from a guard regarding a prisoner's silence at the time of his arrest, failure of defendant's counsel to object to that testimony rendered this representation of defendant ineffective entitling defendant to federal habeas relief. It noted, however, that counsel's ineffective performance was prejudicial to the defendant's trial. This Court

finds that although petitioner's counsel was ineffective in not objecting to the state's inquiry of petitioner's post-arrest silence, it was not prejudicial to his trial.

In certain circumstances, ineffective assistance of counsel can be non-prejudicial requiring the affirmance of the [state court's] judgment in spite of such ineffective assistance. *United States v. Crowley,* 529 F.2d 1066 (3rd Cir. 1976), *cert. denied,* 425 U.S. 995 (1977). The record reveals that even if petitioner's counsel had objected to the state's reference to petitioner's post-arrest silence and the objection was sustained, the jury was more likely than not to convict petitioner due to the substantial amount of evidence against him.

The evidence showed that petitioner was in the victim's presence for four hours and was accurately identified by him. (R p 14-30). The car which petitioner used was also identified by his victim. (R p 121). Petitioner was identified in a non-prejudicial line-up (R p 143) and was arrested with a gun in his possession of the caliber used to shoot his victim. When the gun was test fired, it showed that it was the gun used to shoot his victim. (R p 100, 86-87, 155).

Counsel's failure to object to the State's inquiry into petitioner's post-arrest silence was not prejudicial because the jury received evidence independent of this error sufficient to convict petitioner. Therefore, he is not entitled to federal habeas relief.

2. *Improper comment at line-up.*

Petitioner further claims that he was denied effective assistance of counsel because his trial attorney failed to

object to Sergeant Burns' testimony that petitioner's attorney stated that the line-up was a "good" one, and failed to raise such error on appeal. Although petitioner contends that his statement violated three fundamental guarantees, he has failed to show how Sergeant Burns' testimony regarding petitioner's attorney's statement at his line-up prejudiced the jury.

Since the record reveals that the line-up procedure was constitutionally adequate, it is difficult to see how his attorney's statement could prejudice his client's case. Sergeant Burns testified that he was present at petitioner's line-up. He stated that there were six men in the line-up. All six were black males between twenty and twenty-five years of age and at least six feet high. None were below five foot ten inches in height. All were medium build, between one hundred and fifty-five and one hundred and seventy pounds. The petitioner was in that line-up and all wore jail fatigues.

It is clear the line-up was appropriately conducted in accordance with the requirements set forth in *United States v. Wade*, 388 U.S. 218 (1967). *Thompson v. Slayton*, 334 F.Supp. 352 (W.D. Va. 1971). Mr. Cooper's statement that the line-up was a "good" one did not prejudice petitioner's right to a fair trial. Petitioner was therefore not denied effective assistance of counsel.

3. *Evidence of prior criminal record.*

Petitioner finally claims that he was denied effective assistance of counsel because his trial attorney did not object to evidence implying that the petitioner had a prior criminal record. The record reveals that Robert W. At-

kinson, special agent with the U.S. Army Criminal Investigation Division at Fort Bragg, North Carolina, testified that the victim, James DeLay, identified in a "mug book" a picture of petitioner as the individual who robbed him. Petitioner contends the witness' use of the phrase "mug book" impliedly suggested to the jury that he had a prior criminal record and his counsel rendered ineffective assistance by not objecting to such testimony.

Identification of petitioner through testimonial references to "mug book" photographs will be grounds for federal habeas relief only if it had a prejudicial effect upon the triers of fact. *United States ex rel. Durso v. Pate*, 426 F.2d 1083 (7th Cir. 1970), *cert. denied*, 400 U.S. 995 (1971). The record reveals that the "mug book" testimony could not have had but a slight effect on the jury. Atkinson mentioned it several times in his testimony, but it was not pursued on cross-examination. Further, there was no prior conviction attributed to petitioner through Atkinson's use of the phrase.

This Court holds that the reference to the "mug book" in Atkinson's testimony did not prejudice his trial. Because these references did not prejudice his trial, he has not been denied due process due to the inadequacy of counsel for his failure to object to Atkinson's "mug book" testimony. *Tapia v. Rodriguez*, 446 F.2d 410 (10th Cir. 1971). Therefore, this claim merits no federal habeas relief.

ORDER

Based upon the foregoing findings of fact and conclusions of law, IT IS THEREFORE ORDERED THAT PETITIONER'S MOTION IS GRANTED IN PART

AND DENIED IN PART AND THAT THE OCTOBER 28, 1981 ORDER OF THIS COURT IS VACATED IN PART AND RETAINED IN PART; THAT RESPONDENTS' MOTION TO DISMISS IS GRANTED AND PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS IS DENIED AND HIS CASE DISMISSED.

SO ORDERED. THIS THE 3 DAY OF FEBRUARY, 1982.

AT TRENTON, NORTH CAROLINA.

/s/ John D. Larkins, Jr.
Senior District Judge

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